

SUMMARY OF COMMENTS DURING THE 15-DAY PUBLIC COMMENT PERIOD AND THE BOARD'S RESPONSES

I.

Introduction

The State Personnel Board (Board or SPB) proposes to adopt section 26 (section 26) of Title 2, Chapter 1, of the Code of Regulations (CCR), concerning recordkeeping requirements for personnel-related documents. A 45-day public comment period on these regulations was held from February 5, 2015, through April 6, 2015. On April 14, 2015, the Board posted the modified text of section 26 along with a notice of the public comment period. The public comment period for the modified text was from April 14, 2015, through April 29, 2015. The comments received during the 15-day public comment period were taken under submission and considered. A summary of those comments and the Board's responses are below.

II.

Summary of Written Comments from Melinda Williams, Attorney, Office of the Chief Counsel, Department of Water Resources (DWR).

Comment 1 (Retention Schedule):

DWR questions whether retention for five years is necessary for these records, since previously SPB audits have been conducted on a three year cycle to examine three years of records. A three-year document retention requirement conforms to the State Administrative Manual (SAM) from the Department of General Services. DWR asserts that retaining an additional two years of records solely to satisfy SPB's audit needs will create an extra burden for work and related costs for DWR. DWR urges the Board to reduce the record retention schedule to three years.

Response 1 (Retention Schedule):

The Board believes that a five-year retention schedule is reasonable and appropriate. Under section 266 of the Board's regulations, no corrective action shall be taken on any appointment that has been in effect for five years or longer. Thus, in certain instances, like special investigations into alleged illegal appointments, it may be necessary for the Board to review personnel-related documents and transactions dating back beyond two years and up to five years.

To ensure clarity as to the period of time for record retention, however, the Board has added to section 26(a) that unless otherwise specified appointing powers shall retain

Summary of Comments and Responses

15-Day Comment Period

records for a minimum period of five years from the date of creation of the record. Rule 26(b) provides an exception for records that are routinely and customarily maintained in an employee's official personnel file. Those records shall be retained for a minimum period of five years from the creation date of the document or from the effective date of the employee's appointment, whichever date is later.

Comment 2:

DWR recommends that section (a)(1) of section 26 be amended to clarify the reference to the retention of "affirmative action" records.

Response 2:

As noticed, comments during the 15-day comment period were limited to modifications of the text. There were no comments during the 45-day public comment period related to the phrase "affirmative action" records. This text was thus not modified. Consequently, DWR's comment regarding this phrase concerns unmodified language and should have been raised during the initial 45-day public comment period. The Board, nonetheless, retains discretion to consider and respond to the comment.

Section 26, subdivision (a)(1) refers, in relevant part, to "affirmative action and equal employment opportunity (EEO) records." The Board finds the use of the phrase "affirmative action" sufficiently clear and descriptive. Government Code section 19232 requires each state agency to establish an effective "affirmative action" program to ensure persons with disabilities, who are capable of remunerative employment, access to positions in state service on an equal and competitive basis with the general population. The reference note for the regulation has been changed to include Government Code section 19232.

Comment 3:

DWR suggests that the phrase "but not limited to" be struck from subdivision (a)(2) of section 26. DWR reasons that the phrase makes an open-ended list and creates uncertainty as to what documents the Board requires an agency to keep.

Response 3:

As noticed, comments during the 15-day comment period were limited to modifications of the text. There were no comments during the 45-day public comment period related to the phrase "but not limited to." This text was thus not modified. Consequently, DWR's comment regarding this phrase concerns unmodified language and should have been raised during the initial 45-day public comment period. The Board, nonetheless, retains discretion to consider and respond to the comment.

The Board finds that the phrase "but not limited to" in the context of this regulation provides clear and reasonable guidance. Subdivision (a)(2) of section 26 includes an illustrative or exemplary list of the types of examination records that must be retained.

Summary of Comments and Responses

15-Day Comment Period

“But not limited to” clarifies that the express mention of certain records does not exclude retention of other similar types of records.

However, for subdivisions (a)(2) and (3), the Board has modified the descriptions of records listed therein to ensure clarity and consistency with Government Code section 18661 and those documents that the Board has been reviewing during compliance reviews.

Comment 4:

As to subdivision (a)(3) of section 26, DWR makes the same comment to the phrase “but not limited to” as made in Comment 3. DWR also notes that subdivision (a)(3) references the retention of “EEO questionnaires,” but that these questionnaires are removed from the application and shredded. DWR further asserts that the reference to “interview records” is unclear.

Response 4:

To the extent DWR’s comments regard unmodified language, those comments should have been raised during the initial 45-day public comment period. The Board, nonetheless, retains discretion to consider and respond to the comments.

See Response 3. In addition, the reference to “EEO questionnaires” was inadvertently not stricken after the 45-day comment period and is therefore stricken. For clarity, the reference to “interview records” has been changed to “interview questions.”

Comment 5:

As to subdivision (a)(4) of section 26, DWR makes the same comment to the phrase “but not limited to” as made in Comment 3. DWR also asserts that the remaining language is general, and DWR is unclear about what exact documents are to be retained. DWR points out that information on the title, series, and grade of position classifications is accessible from the California Department of Human Resources (CalHR).

Response 5:

As to the comment concerning “but limited to,” see Response 3. There were no comments during the 45-day public comment period related to the topic of subdivision (a)(4), position descriptions. The text of this subdivision was thus not modified. Consequently, DWR’s comments regarding subdivision (a)(4) concerns unmodified language and should have been raised during the initial 45-day public comment period. The Board, nonetheless, retains discretion to consider and respond to the comment.

Subdivision (a)(4) concerns records related to “position descriptions,” not merely classifications. The best source for this information is the department using the position. The Board, however, for greater clarity, has modified the descriptions of the records in subdivision (a)(4).

Summary of Comments and Responses

15-Day Comment Period

Comment 6:

DWR states it is uncertain what documents should be retained under subsection (a)(5) or how these documents differ from records retained under (a)(4).

Response 6:

There were no comments during the 45-day public comment period related to the topic of subdivision (a)(5), requests for classification of new positions or reclassification of existing positions. The text of this subdivision was thus not modified. Consequently, DWR's comments regarding subdivision (a)(5) concerns unmodified language and should have been raised during the initial 45-day public comment period. The Board, nonetheless, retains discretion to consider and respond to the comment.

The Board finds that the text related to the classification of new positions or reclassification of existing positions in the context of the regulation is sufficiently clear and descriptive so as to allow departments to identify those documents that must be retained, as specified. To simplify the regulation and avoid confusion, the organizational scheme of the regulation is changed to insert the text of subdivision (a)(5) into subdivision (a)(4). Consequently, subdivision (a)(5) is deleted.

Comment 7:

As to subdivision (b) of section 26, DWR makes the same comment to the five-year record retention schedule as made in Comment 1. DWR also believes that retaining records for employees who have transferred to another State entity creates an unnecessary burden and duplication of audit records to be reviewed. DWR suggests the following language:

Appointing powers shall retain the following records for a minimum of ~~five~~ three years from the effective date of the employee's appointment, unless the employee has transferred to another State entity.

Response 7:

As to the record retention schedule, see Response 1. In addition, this regulation is consistent with the Board's auditing powers and function, and does not create an unnecessary burden or duplication of records. The purpose of the Board's compliance review of employee personnel records, such as Requests for Personnel Actions, probation reports, and loyalty oaths concerns whether the appointing power's personnel practices are in compliance with civil service laws and Board regulations. (See Gov. Code, § 18661.) Whether at the time of the compliance review the employee whose employment records are being reviewed is still employed with the same appointing power or has transferred to another appointing power is irrelevant: the question is whether the appointing power in selecting and hiring that employee followed civil service laws and Board regulations. Were the Board to adopt DWR's suggested wording, the Board would not have access to certain documents relevant to the appointing power's personnel practices, if the employee were no longer employed with the appointing

Summary of Comments and Responses

15-Day Comment Period

power at the time of the audit. This would unnecessarily diminish the effectiveness and usefulness of the Board's compliance reviews.

Comment 8:

As to subdivision (b)(1) of section 26, DWR makes the same comment to the phrase "but not limited to" as made in Comment 3. DWR also requests that the record retention schedule be reduced to three years from five years.

Response 8:

As to the comment concerning "but limited to," see Response 3, and as to the record retention schedule, see Response 1.

Comment 9:

DWR comments that the use of the terms "orderly and systematic" in subdivision (c) are undefined expectations. DWR suggests, "All records shall be retained in the order listed above."

Response 9:

The Board finds that the plain meaning of these terms is sufficiently clear and descriptive so as to allow departments to retain documents, as specified, without imposing an overly strict or demanding process. For purposes of clarity, the Board adds language in subdivision (c) that expressly allows records to be retained electronically.

Comment 10:

DWR comments that it is uncertain what "duplicate copies" means in subdivision (d). DWR also believes that the sentence referencing "duplicate copies" should be separated as subdivision (e).

Response 10:

The Board finds that the plain meaning of the term "duplicate copies" is sufficiently clear and descriptive so as to allow departments to retain documents, as specified. The sentence, "Duplicate copies of the same record are not required to be retained," directly relates to the subject matter of subdivision (d) and provides clarity. Therefore, the Board finds that separating the last sentence into a new subdivision is unwarranted.

III.

Summary of Written Comments from David Rose, Attorney, Office of the Chief Counsel, State Water Resources Control Board (SWRCB).

Comment 1:

The SWRCB requests that the reference to maintaining the Equal Employment Opportunity (EEO) questionnaires in subdivision (a)(3) be removed.

Summary of Comments and Responses

15-Day Comment Period

Response 1:

The reference to “EEO questionnaires” was inadvertently not stricken after the 45-day comment period and is therefore stricken.

Comment 2:

SWRCB believes that subdivision (b)(1) should not require a state agency to maintain the identified records for five years when an employee voluntarily separates from that agency, or, at a minimum, when the employee transfers to another state agency.

SWRCB reasons that in such a case, the employee’s official personnel file (OPF), where most if not all of the identified documents are maintained, is, as a standard practice, transferred with the employee to the new appointing power. SWRCB sees no benefit to the first appointing power maintaining these records.

Response 2

See Response to Comment 7 above.

IV.

Conclusion

The Board appreciates the feedback it received regarding the regulations during the 15-day public comment period. The modified text with the changes clearly indicated are available to the public for a second 15-day public comment period. Written comments will be accepted as provided in the Notice of Further Modification to Text of Proposed Regulation for Second 15-Day comment Period.